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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-460

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

SUBURBAN TRANSIT CORPORATION AND H.A.M.L. CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 42-66) is reported at 499 F.2d 78. The decision and order of the National Labor Relations Board (Pet. App. 1-41) are reported at 203 NLRB 69.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 67-68) was entered on July 22, 1974. The petition for a writ of certiorari was filed on October 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Was the Court of Appeals correct in deciding, in conformity with all other reviewing courts, that the execution of the collective bargaining agreement by respondent with the incumbent union was not an unfair labor practice in that there was no question concerning representation?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet App. 70-76.

STATEMENT

The collective bargaining agreement between Suburban Transit Corporation, herein called Suburban or Respondent,[1] and United Transportation Union, Lodge No. 1589, herein called UTU, expired September 14, 1971. Negotiations for a new contract took place during August and September, 1971. The chief negotiator for UTU was Rava, who, during this period of time and unbeknown to UTU, was seeking ways to replace UTU with petitioner. Suburban's proposals were rejected by the employees on September 14, 1971. A membership meeting on September 24, 1971 became chaotic and broke up due to the conduct of a few employees. On September 28, 1971, there was general agreement between the parties that Suburban's proposals would have been accepted if the employees had listened to them. The mediator suggested that a petition be drawn up; that members of the

1. Although H.A.M.L. Corporation is also a named respondent, no question was raised in the petition for a writ regarding the findings of the Court of Appeals for the Third Circuit in connection with the H.A.M.L. case.

negotiating committee speak to each employee, and if a majority signed the petition, the committee could sign the contract. Rava was the sole person to oppose such a petition. That evening, the UTU representative advised that due to Rava's collaboration with petitioner, he was being removed as chairman of the UTU negotiating committee. Thereupon, a petition was prepared and several UTU negotiating committee members circulated same to the employees and explained Suburban's proposals. On October 1, 1971, fifty-one signatures were obtained on the petition, which was turned over to the UTU representative on October 2, 1971. Since fifty-one employees in the unit of sixty-six had signed the petition, the committee advised Suburban on October 2, 1971 that the majority approved the proposals and that the committee was prepared to sign a renewal agreement. A check by Suburban determined that the signatures were valid. The contract was executed October 14, 1971. In the meantime, petitioner had filed a representation petition on September 29, 1971. Suburban received said petition on October 2, 1971, the same day as it was presented with the UTU petition.

Pursuant to charges filed by petitioner, the Administrative Law Judge, as well as the Board's Division of Judges, found that the contract between Suburban and the UTU was in violation of *Midwest Piping and Supply Company*, 63 NLRB 1060 (1945). Upon appeal, the Third Circuit of the United States Court of Appeals reversed the Board's finding in this regard.

ARGUMENT

The Court below correctly applied the prior law in its circuit, as well as the law in other circuit courts.

1. The sole ground advanced by petitioner for a writ deals with the application of the doctrine espoused by the Board in *Midwest Piping and Supply Company, supra.* In that case, the Board found that the Company violated the National Labor Relations Act, herein called the Act, by entering into an agreement with one union at a time when there existed a question concerning representation of the employees. The inquiry underlying the application of the *Midwest Piping* doctrine is whether there exists a question concerning representation.

The Third Circuit made its position clear in *NLRB v. Swift & Company,* 294 F.2d 285 (3rd Cir. 1961). In the *Swift* case, the Board, relying on the *Midwest Piping* doctrine, found that the filing of a petition by a rival union raised a question concerning representation and that renewal of the agreement with the incumbent union constituted a violation of the Act. In determining whether there existed a question of representation, the Third Circuit was guided by what the Board itself said while referring to the *Midwest Piping* doctrine in *Ensher, Alexander and Barsoom, Inc.*, 74 NLRB 1443, 1445 (1947):

> "that doctrine, necessary though it is to protect freedom of choice in certain situations, can easily operate in derogation of the practice of continuous collective bargaining and should, therefore, be strictly construed and sparingly applied."

The Court decided that there was no real question of representation established merely from a showing of

the filing of a petition and an administrative determination that a hearing should be held. Accordingly, the Court denied the Board's petition for enforcement of its order and stated that the Board's finding of an unfair labor practice must fall in the absence of substantial evidence in the record to support the finding that the employer had a reasonable basis for believing that the incumbent no longer represented a majority of its employees. Likewise, Suburban had no reasonable basis to believe that the UTU no longer represented a majority of its employees. This was amply demonstrated when the UTU petition to accept the contract was signed by 51 out of a total of 66 employees.

Shortly before the Third Circuit's decision in *Swift*, the Seventh Circuit held in *St. Louis Independent Packing Company v. NLRB*, 291 F.2d 700 (7th Cir. 1961) that the mere filing of representation petitions and the holding of a hearing by the Board was insufficient to establish a question concerning representation. In *William Penn Broadcasting Co.*, 93 NLRB 1104 (1951), the Board held that the pendency of a petition does not impose a duty upon an employer to refrain from continuing to recognize and deal with the incumbent union.

Later, the Ninth Circuit, in *NLRB v. Peter Paul, Inc.*, 467 F.2d 700 (9th Cir. 1972), stated that the Board's reliance on the *Midwest Piping* doctrine was misplaced. In denying enforcement of the Board's order, the Court adopted the *Swift* philosophy in a case similar to Suburban. The employer there signed a contract with the incumbent union after receiving knowledge of the filing of a petition by an outside union. The Court held that there was no question of representation and that the employer's contract with the incumbent was proper. The same view was expressed by the Eighth Circuit in *Iowa Beef Pack-*

ers v. NLRB, 331 F.2d 176 (8th Cir. 1964); the Second Circuit in *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2nd Cir. 1970) and *NLRB v. Midtown Service Company*, 425 F.2d 665 (2nd Cir. 1970); and the Sixth Circuit in *NLRB v. North Electric Company*, 296 F.2d 137 (6th Cir. 1961).

In *Cleaver-Brooks Mfg. Corporation v. NLRB*, 264 F.2d 637 (7th Cir. 1959), *cert. den'd* 361 U.S. 817 (1959) the Court, in setting aside the Board's order, held that no question concerning representation existed and that the company's recognition of one of two rival unions was proper, where the recognized union had established that it represented thirty-five out of a possible forty-seven employees. This was found to be a clear showing of majority representation. The United States Supreme Court denied the Board's petition for Writ of Certiorari. 361 U.S. 817 (1959). The Sixth Circuit concluded likewise in *American Bread Company v. NLRB*, 411 F.2d 147 (6th Cir. 1969) where the recognized union had procured one hundred and seventy cards out of the unit of two hundred ninety-five employees.

Again in *NLRB v. Standard Steel Spring Co.*, 180 F.2d 942 (6th Cir. 1950), the Court denied enforcement of the Board's order, and held that the Company's recognition of one union was proper, despite the pending petition before the Board. To the same effect is the Eighth Circuit opinion in *Modine Manufacturing Company v. NLRB*, 453 F.2d 292 (8th Cir. 1971); the Sixth Circuit ruling in *NLRB v. Wheland Company*, 271 F.2d 122 (6th Cir. 1959); and the Fourth Circuit holding in *District 50, United Mine Workers of America v. NLRB*, 234 F.2d 565 (4th Cir. 1956).

In *NLRB v. Indianapolis Newspapers*, 210 F.2d 501 (7th Cir. 1954), the Court, in denying enforcement to the

Board's order, found that where one of two competing unions submitted to the company a petition bearing signatures of more than sixty percent of the employees in the unit, the company's recognition of said union was proper and no unfair labor practice had been committed. In fact, the Court stated that:

> "Once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees" (page 503-504).

Likewise, in *NLRB v. Air Master Corporation*, 339 F.2d 553 (3rd Cir. 1964), the Court found that recognition of one of two competing unions or contracting with it was not an unfair labor practice where a clear majority of employees, without subjection to coercion or other unlawful influence, made manifest their desire to be represented by a particular union. The court there appropriately stated:

> "It is interference with the employees' choice, not frustration of the Board's design to hold an election, which the statute proscribes as an unfair labor practice. And the latter is not necessarily determinative of the former. Indeed, a Board conducted election is merely a means for expressing a free choice. If such a choice has in fact been made manifest and the employer honors it, the purpose of an election has been accomplished" (at page 556).

Recently in *Playskool, Inc. v. NLRB*, 477 F.2d 66 (7th Cir. 1973), the Court denied enforcement of the Board's order. It reiterated that:

> "The courts (of appeal) have generally refused to find a violation of Section 8(a) (2) where an employer

> has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support (citing numerous cases)" (at page 70).

The foregoing demonstrates the uniformity of approach by all of the Circuit Courts when confronted with the *Midwest Piping* doctrine.

2. In support of petitioner's contention that there exists a conflict among the courts, he cited *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) and *NLRB v. Signal Oil and Gas Company*, 303 F.2d 785 (5th Cir. 1962). Even the most brief examination of these two cases demonstrates that such claim is invalid. *Garment Workers'* involved recognition of a minority union. The entire decision dealt with a discussion of the good faith of the company in extending such recognition and that such good faith was no defense since the Act prohibits employer support of a minority union. The Supreme Court held, however, that:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election."

In *Signal Oil*, the Company signed a contract with the incumbent union after a rival union claimed that it represented a majority of the employees and filed a petition. The Court found that a question concerning representation existed since no one knew as of the execution of the contract whether the incumbent commanded the allegiance of a majority of the employees. The basis for the Court's ruling was the testimony of the president of the incumbent union:

> "We were undecided how the majority of our people stood, whether they were behind our Federation (the incumbent), or whether they were behind OCAW (the rival)."

The Court in *Signal Oil* cited *Garment Workers'* in stating that an employer has the duty to take reasonable steps to verify representation claims of the union with which it proposes to negotiate a collective bargaining agreement. Once those steps are taken, and a union proves its majority status to an employer, it is at least permissible, if not mandatory, for the employer to bargain and contract with the majority union. Neither *Garment Workers* nor *Signal Oil* is to the contrary. Neither case conflicts with the numerous cases cited above in any respect, including that of the burden of proof requirement, as claimed by petitioner. In all of the cases referred to above, including the instant matter, the Circuit Courts have uniformly held that when a union claims majority status, submits proof of same and the employer verifies such majority status, the employer may lawfully recognize and contract with such majority union.

3. Petitioner cited *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971) and *San Diego Building Trades Council, Millmens' Union, Local 2020, Building Material and Dump Drivers, Local 36, v. Garmon*, 359 U.S. 236 (1959) in support of his theory that these two cases conflict with the resistance offered by the Circuit Courts to the *Midwest Piping* doctrine. In essence, petitioner contends that activities arguably subject to Sections 7 and 8 of the Act are exclusively in the Board's province; and that Courts of Appeal should not intrude into this area and reverse Board policies and findings.

Garmon involved a State Court action for an injunction and damages as a result of peaceful picketing. The United States Supreme Court found that since it was arguable that the union activity came within Section 7 or 8 of the Act, state jurisdiction was displaced; and the Board was the exclusive primary tribunal to adjudicate the question. *Lockridge* involved a court suit against a union by a union member who was suspended from union membership because of an arrearage in his payment of union dues. The United States Supreme Court, in applying the rule of *Garmon,* stated that both federal and state court jurisdiction was pre-empted because the union's conduct was arguably protected or prohibited by the Act.

Respondent recognizes the concept of *Garmon* and *Lockridge;* however, it is inapposite here. This case was not instituted in the federal or state court. Rather, it began before the Board and, like every other court case above cited dealing with the *Midwest Piping* doctrine, it was subject to review; and the Third Circuit, after review, rendered the judicial decision in conformity with the other Circuit Courts on that issue.

The concept of pre-emption and exclusivity of Board jurisdiction in matters arguably subject to the Act applies to primary jurisdiction. It does not bar judicial review of Board decisions. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL),* 346 U.S. 485 (1953).

Indeed, there is no conflict among the various Circuit Courts, either as between themselves or with the United States Supreme Court. They all have applied generally the law of the *Swift* case so long as the recognized union held a majority, free from coercion or unlawful influence. The Board is unwilling to accept this proposition uniformly applied by the courts, and therein lies the problem. Nevertheless, that does not constitute a proper basis for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ for certiorari should be denied.

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